



Kamau & another (Suing as Executors of the Estate of the Late James Kamau Karogi) v Mosiany; Blueline Safaris Shuttle Limited (Affected Company) (Commercial Miscellaneous Application E112 of 2023) [2024] KEHC 2303 (KLR) (Commercial and Tax) (5 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2303 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E112 OF 2023

JWW MONG'ARE, J

MARCH 5, 2024

IN THE MATTER OF THE COMPANIES ACT, 2015

AND

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE A
DERIVATIVE ACTION ON BEHALF OF BLUELINE SAFARIS SHUTTLE LIMITED**

BETWEEN

KAROGI KAMAU 1ST APPLICANT

JESSICA WAMBUI KAMAU 2ND APPLICANT

**SUING AS EXECUTORS OF THE ESTATE OF THE LATE JAMES KAMAU
KAROGI**

AND

MAY SILANTOI MOSIANY RESPONDENT

AND

BLUELINE SAFARIS SHUTTLE LIMITED AFFECTED COMPANY

RULING

1. Before me is a Notice of Motion application dated 13th February 2022 filed pursuant to the provisions of Sections 238, 239, & 240 of the *Companies Act*, The *Companies (General) Regulations 2015*, Order 51 Rule 1 of the *Civil Procedure Rules* and Sections 1A, 2B, & 3A of the *Civil Procedure Act*, the inherent powers of the Court and all provisions of the law. The applicants are seeking the following orders –



- i. Spent;
 - ii. That the Applicant be granted leave to file a derivative action seeking relief on behalf of Blueline Safaris Shuttle Limited in respect of the acts and omissions by the Respondent, involving negligence, default, breach of duty and breach of trust in her capacity as director of the Company on such terms as the Honourable Court considers fit;
 - iii. Spent;
 - iv. That pending the hearing and determination of this suit a temporary injunction do issue restraining the Respondent, her servants, agents and/or employees from selling, alienating, transferring, charging, disposing, removing or in any manner whatsoever dealing with the assets of the Company pending the hearing and determination of the Application;
 - v. That pending the hearing and determination of the derivative claim, a temporary injunction do issue restraining the Respondent, her servants, agents and/ or employees from selling, alienating, transferring, charging, disposing, removing or in any manner whatsoever dealing with the assets of the Company pending the hearing and determination of the suit; and
 - vi. That costs of this application to be provided for.
2. The application is premised on the grounds on the face of the motion and is supported by an affidavit sworn on the same day by Karogi Kamau, an executor of the estate of the late James Kamau Karogi (deceased). In opposition thereto, the Respondent filed a replying affidavit sworn on 28th March 2023 by Mary Silantoi Mosiany the Respondent herein.
 3. The Applicant's case is that the late James Kamau Karogi (deceased) was a director/majority Shareholder of the affected Company holding 670 shares against the Respondent's 330 shares. However, shortly after his demise, the Respondent attempted to fraudulently transfer the deceased's shareholding to herself. As a result, a complaint was launched with the Business Registration Service on 19th July 2021, and on 10th December 2021, it responded by reinstating the shareholding positions until the succession proceedings are concluded.
 4. The Applicants averred that in spite of the foregoing, the Respondent is running the day the day-to-day operations of the affected Company solely to the exclusion of the deceased's estate, and has illegally transferred the Company's assets to herself without any authorization and/or benefit to the Company. Therefore, leave is necessary to institute the substantive derivative suit against the Respondent.
 5. The Respondent in opposition thereto deposed that in 2011, the law required Public Service Operators to operate within a regulated Sacco or a registered Company, but the *Companies Act* at the time required at least two Directors for registration of a private limited Company. As a result, she requested the late James Kamau Karogi (deceased) with whom they were cohabiting as husband and wife until his demise, to register the affected Company together in 2011. The deceased acceded to her request as he was also desirous in conducting his other businesses including a petrol station, separate from her transport business, using the affected Company.
 6. The Respondent stated that since incorporation of the affected Company, she solely ran the day-to-day operations of the transport business of the affected Company, and the late James Kamau Karogi (deceased) was responsible for his petrol station business. Further, the Applicants' appointment as executors of the estate of the late James Kamau Karogi (deceased) has not been confirmed, since there is an ongoing Succession Cause Number E079 of 2021 in Kiambu High Court wherein there are pending



objections from her and other objectors as to their appointment. Therefore, they have no *locus standi* to file the instant application.

7. It was stated by the Respondent that the exhibits produced and marked by the Applicants as K4 (a) is a mere list of vehicles operating under the affected Company for purposes of obtaining Transport Licensing Board (TLB) License. However, the records at NTSA indicate that ownership of the said vehicles has always belonged to her as an individual even. For this reason, they do not form part of the Company's assets.
8. The instant application was canvassed by way of written submissions which were highlighted on 7th November 2023. I shall not regurgitate the contents of the said submissions but I have considered them and will refer to them in my determination.

Analysis and Determination

9. I have considered and analyzed the pleadings filed by the parties herein in support and in opposition to the instant application. I have also considered the written submissions by Counsel for parties and I am of the view that the issues that arise for determination are: -
 - i. Whether the applicants have the requisite *locus standi* to file the application herein;
 - ii. Whether the applicants should be granted leave to institute a derivative suit against the Respondent on behalf of the affected Company; and
 - iii. Whether an order for temporary injunction should issue.
10. Before I delve into the merits and demerits of this case, it is important to note that it is trite law that parties are bound by their pleadings, and submissions are not pleadings but an Advocates marketing language. The Respondent submitted that the deceased's shares in the affected Company form part of his intestate estate which is not administered by the will that the applicants obtained a grant of letters of administration, since the said will is dated 12th January 1987 whereas the affected Company was incorporated in the year 2011. However, this assertion is not contained in the Respondent's replying affidavit thus the Court will not place reliance on it and/or be persuaded by it in its determination of the issues raised herein.

Whether the Applicant has the Requisite Locus Standi to File the Instant Application.

11. The Court of Appeal in the case of *Alfred Njau v City Council of Nairobi* [1983] KLR 625 defined what constitutes *locus standi* as hereunder: -

“...*locus standi* literally means a place of standing and refers to the right to appear or heard in court or proceedings and to say that a person has no *locus standi* means that he/she has no right to appear or be heard in such and such proceedings”
12. The Applicants have filed the instant application in their capacity as executors of the estate of the late James Kamau Karogi (deceased). In support of this averment, the Applicants have annexed a copy of grant of probate of written will granted to them by the High Court of Kenya sitting at Kiambu in Succession Cause No. E079 of 2021. The Respondent submitted that the deceased's shares of the affected Company have not yet been transferred to the applicants, neither are the applicants' members, Directors and/or shareholders of the affected Company. Thus, the instant application is not only premature but the applicants also do not have *locus standi* to file it.



13. She averred that the Applicant's appointment of the applicant's as executors of the estate of the late James Kamau Karogi (deceased) has not yet been confirmed since there are pending objections from her and other objectors as to their appointment. However, I note that she did not produce any evidence of the alleged objections filed in Kiambu Succession Cause No. E079 of 2021, thus her averments remained mere assertions with no probative value. The above notwithstanding, the Applicants have also neither averred nor demonstrated that the grant of probate issued to them on 5th January 2023 with respect to the estate of late James Kamau Karogi (deceased) has been confirmed.
14. Be that as it may, having been appointed as executors of the estate of the late James Kamau Karogi (deceased) vide a grant of probate of written will dated 5th January 2023, and the said appointment has not been varied and/or set aside by a Court of competent jurisdiction, the Applicants have a duty to preserve the estate of the late James Kamau Karogi (deceased).
15. Accordingly, since it is not disputed that the late James Kamau Karogi (deceased) was a Director/ Shareholder of the affected Company, the affected Company forms part of his estate. For this reason, the Applicants have the requisite *locus standi* to file the instant application.

Whether the Applicants should be Granted Leave to Institute a Derivative suit against the Respondent on Behalf of the Affected Company.

16. Derivative claims are provided for under Sections 238-241 of the [Company's Act](#) 2015. Section 238 defines a derivative claim as hereunder -
 1. In this Part, "derivative claim" means proceedings by a member of a Company-
 - a. in respect of a cause of action vested in the Company; and
 - b. seeking relief on behalf of the Company.
 2. A derivative claim may be brought only-
 - a. under this Part; or
 - b. in accordance with an order of the Court in proceedings for protection of members against unfair prejudice brought under this Act.
 3. A derivative claim under this Part may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the Company.
17. This Court has the discretion to either allow or disallow an application for leave to institute a suit as a derivative action. In doing so, the Court must first satisfy itself that the Applicant has established a *prima facie case* with high chances of success. The Appellant relied on the case of [Isaiah Waweru Njumi & 2 Others v Muturi Ndungu](#) [2016] eKLR, and submitted that they are representatives of the estate of the late James Kamau Karogi (deceased) who was the majority shareholder in the affected Company. But since his demise, the Respondent who is the only remaining Director/Shareholder took charge of the operations of the Company to the exclusion of the deceased's estate. As a result, she has been able to illegally transfer the Company's assets to herself without the authority of the deceased's estate. For this reason, the Appellant argued that it has established a *prima facie case* with a probability of success.
18. The Respondent on the other hand relied on the case of [Mrao v First American Bank of Kenya Limited & 2 Others](#) [2003] eKLR and further submitted that the Company assets referred to by the Applicants are motor vehicles operating under the name of the affected Company, which vehicles belong to her.



She argued that no transfer of Motor Vehicles has been effected since 7th May 2021 when the deceased passed away. Consequently, the Applicants have not established a *prima facie case* with chances of success.

19. The Applicants' case is based on the fact that the Respondent is solely running the day-to-day activities of the affected Company to the exclusion of the estate of the deceased and as a result, she has been able to illegally transfer to herself motor vehicles belonging to the affected Company. For this reason, the Applicants are seeking leave to institute a derivative claim against the Respondent so as to protect the Company's interests as well as that of the estate of the deceased.
20. Notably, the deceased was the majority shareholder of the affected Company holding a total of 670 shares against the Respondents 330 shares, which Company had only two Directors and Shareholders. For this reason, I opine that the deceased made most of the decisions affecting the Company since he would always out vote the Respondent in the Company's Board meetings. The Court in the case of *Sultan Hasham Lalji and 2 Others v Ahmed Hasham Lalji and 4 Others* [2014] eKLR, the Court of Appeal held that: -

“It is the minority shareholders that are availed to the protection by the exceptions since generally majority shareholders exercise powers of the Company and control its affairs.”
21. Further, in *Altaf Abdulrasul Dadani v Amini Akberazi & 3 Others*, Nairobi (Milimani) HCCC No. 913 of 2002 [2004] 1 KLR 95, the Court held that: -

“By derivative Suits, the minority shareholders(s) feeling that wrongs have been done to the Company which cannot be rectified by the internal Company mechanisms like meetings and resolutions, because the majority shareholders are in control of the Company, come to court as agents of the ‘wronged’ Company to seek reliefs or relief for the Company itself, all the shareholders including the wrong doers, and not for the personal benefit of the Suing minority shareholders...”
22. As already explained hereinabove, the Applicants are executors of the estate of the late James Kamau Karogi (deceased) who was the majority shareholder of the affected Company. As a result, being representatives of the majority shareholder of the affected Company they are not afforded the protection of Sections 238-241 of the *Companies Act* 2015 which provides for derivative suits.
23. This Court therefore finds that the affected Company being a juristic person, is the proper entity to bring a suit against the Respondent for any wrongs done. The Applicants Being representatives of the majority shareholder of the affected Company are at liberty to pass a resolution to this effect. To this end I am guided by the Court's holding in the case of *Moir vs Wallerstainer* [1975] 1 All ER 849 at page 857, where it stated that:-

“It is a fundamental principle of our law that a Company is a legal person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the Company itself is the one person to sue for the damage. Such is the rule in Foss V. Harbottle (1843) 2 Hane 461. The rule is easy enough to apply when the Company is defrauded by outsiders. The Company itself is the only one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again the Company is the only person who can sue.” (emphasis added).



24. In view of the above, this Court shall not determine the issue on injunction as the said order cannot issue in a vacuum.
25. The upshot of the above finding is that the instant application is not merited, thus it is hereby dismissed with costs to the Respondent.
- 26 It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF MARCH, 2024.

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J.W.W. MONG'ARE

JUDGE

In the presence of:-

Ms. Muia holding brief for Mr. Gitonga for the Applicant.

Mr. Kerio for the Respondent.

Amos- Court Assistant

